No. 02-1574

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,
v.
MICHAEL A. NEWDOW, ET AL., *Respondents.*

On Petition for A Writ of Certiorari to the
United States Court of Appeals for Ninth Circuit

Brief Amici Curiae of United States Senators Sam Brownback, Saxby Chambliss, John Cornyn, and Lindsey Graham, United States Representatives Robert Aderholt, Todd Akin, Bob Beauprez, Sanford Bishop, Jr., Marsha Blackburn, Roy Blunt, Chris Cannon, Michael Collins, Jo Ann Davis, John Doolittle, Jeff Flake, Trent Franks, Virgil Goode, Jr., Duncan Hunter, Ernest Istook, Jr., Walter Jones, Jr., Ric Keller, Frank Lucas, Donald Manzullo, Jim Marshall, Jeff Miller, C.L. Otter, Charles Pickering, Jr., Joseph Pitts, Jim Ryun, John Shimkus, Mark Souder, John Sullivan, and Dave Weldon, M.D., the American Center for Law and Justice, and One Hundred Fifty-Six Thousand Five Hundred and Ninety-Seven American Citizens Supporting Petitioner

JAY A. SEKULOW
Counsel of Record
COLBY M. MAY
JAMES M. HENDERSON
STUART J. ROTH
JOEL H. THORNTON
JOHN P. TUSKEY
LAURA B. HERNANDEZ

AMERICAN CENTER FOR LAW & JUSTICE
205 Third Street SE
Washington, D.C. 20003
(202) 546-8890

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTEREST OF AMICI*

Amici, Sam Brownback, Saxby Chambliss, John Cornyn, and Lindsey Graham are members of the United States Senate, and Robert Aderholt, Todd Akin, Bob Beauprez, Sanford Bishop, Jr., Marsha Blackburn, Roy Blunt, Chris Cannon, Michael Collins, Jo Ann Davis, John Doolittle, Jeff Flake, Trent Franks, Virgil Goode, Jr., Duncan Hunter, Ernest Istook, Jr., Walter Jones, Jr., Ric Keller, Frank Lucas, Donald Manzullo, Jim Marshall, Jeff Miller C.L. Otter, Charles Pickering, Jr., Joseph Pitts, Jim Ryun, John Shimkus, Mark Souder, John Sullivan, and Dave Weldon, M.D., are members of the United States House of Representatives currently serving in the One Hundred Eighth Congress.

Amicus, American Center for Law and Justice (ACLJ), is a public interest law firm committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. Counsel of Record for the ACLJ has presented oral argument in eight cases before this Court. ACLJ attorneys have also participated as amicus curiae in numerous cases before this Court and the lower federal courts.

Amici, 156,597 Americans, are citizens who represent all fifty states. These amici include school-age children, many of whom attend public schools, and desire to recite the Pledge of Allegiance in its entirety.

---

* This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation of submission of this brief.

Amici urge this Court to grant certiorari in this case because they are convinced that the Ninth Circuit's decision holding the phrase "under God" in the Pledge of Allegiance unconstitutional is profoundly wrong. Recitation of the Pledge of Allegiance in public schools is fully consistent with the Establishment Clause of the First Amendment to the United States Constitution. The words of the Pledge echo the conviction held by the Founders of this Nation that our freedoms come from God. Congress placed the phrase "One Nation Under God" in the Pledge of Allegiance for the express purpose of reaffirming America's unique understanding of this truth, and to distinguish America from atheistic nations who recognize no higher authority than the State. The First Amendment affords atheists complete freedom to disbelieve; it does not compel the federal judiciary to redact religious references in patriotic exercises in order to suit atheistic sensibilities.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted Because This Case Presents a Constitutional Question of Exceptional Importance.

The magnitude of the question presented in this case can hardly be overstated. Although the primary issue is whether the Establishment Clause prohibits public schools from leading students in the voluntary recitation of the Pledge of Allegiance, far more is at stake. The Ninth Circuit's decision renders constitutionally suspect a number of public school practices that traditionally have been considered an important part of American public education.

The first casualty of the Ninth Circuit's decision will be the practice of requiring students to learn and recite

passages from many historical documents reflecting the Nation's religious heritage and character. If a public school district violates the Establishment Clause by requiring students to recite the Pledge of Allegiance, it is difficult to conceive of a rationale by which compelled study or recitation from the Nation's founding documents would not also violate the Constitution. The Mayflower Compact,[1] the Declaration of Independence,[2] and the Gettysburg Address[3]

---

[1]The Mayflower Compact, written by William Bradford in 1620, provides:

> We whose names are underwritten, the loyal subjects of our dread sovereign Lord, King James, by *the grace of God*, of Great Britain, France and Ireland king, defender of the faith, etc., having undertaken, *for the glory of God, and advancement of the Christian faith*, and honor of our king and country, a voyage to plant the first colony in the Northern parts of Virginia, do by these presents solemnly and mutually *in the presence of God*, and one of another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meet and convenient for the general good of the colony, unto which we promise all due submission and obedience.

Mayflower Compact, *available at* http://www.project 21.org/MayflowerCo mpact.html (emphasis added).

[2] The Declaration of Independence recognizes that human liberties are a gift from God: "All men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." *The Declaration of Independence* para. 2 (U.S. 1776). Jefferson wrote further that the right to "dissolve the political bands" connecting the Colonies to England derives from Natural Law and *"Nature's God*." *Id.* para. 1. The founders also believed that God holds man accountable for his actions as the signers of the Declaration "appeal[] to the *Supreme Judge of the world* to rectify their intentions." *Id.* para. 32.

all contain religious references substantiating the fact that Americans are a predominantly "religious people whose institutions presuppose a Supreme Being." *Zorach v. Clausen*, 343 U.S. 306, 313 (1952). *See also Newdow v. United States Congress*, 321 F.3d 772, 778 (9th Cir. 2003) (O'Scannlain, J., Kleinfeld, J., Gould, J., Tallman, J., Rawlinson, J., and Clifton, J., dissenting from denial of rehearing en banc). Indeed, the references to deity in these historical documents are presumably even more problematic according to the Ninth Circuit's reasoning because they proclaim not only God's existence but specific dogma about God – He is involved in the affairs of men; He holds men accountable for their actions; and He is the Author of human liberty. Additionally, while students may be exempted from reciting the Pledge of Allegiance, *see Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), student recitations of passages from historical documents are often treated as a mandatory part of an American history or civics class, not subject to individual exemptions.

Equally disturbing is the likelihood that the Ninth Circuit's decision will eventually foreclose the Nation's school districts from teaching students to sing and appreciate the Nation's patriotic music as well as a vast universe of classical music with religious themes. Students might learn about the Nation's founding documents without being required to recite them. Public school music programs cannot exist, however, without student performance. Thus, patriotic anthems, such as "*America the Beautiful*" and "*God Bless America*," will become taboo because they cannot realistically be learned unless they are sung. Such musical

---

[3]On November 19, 1863, President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom--and that Government of the people, by the people, for the people, shall not perish from the earth." President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863).

treasures as Bach's choral arrangements and African-American spirituals will also become constitutionally suspect, at least as a part of public school music curricula. According to the Ninth Circuit's logic, if a group of students sing *"God Bless America,"* the Establishment Clause is violated because an atheistic student might *feel coerced* to sing along (and indeed may well be coerced inasmuch as music teachers are not constitutionally compelled to exempt students from singing with the class).

The Ninth Circuit's effort to distinguish the Pledge of Allegiance from religious references in historical documents and music fails. The court reasoned that the Pledge of Allegiance is "performative," whereas the Declaration of Independence and patriotic music are not. *Newdow v. United States Congress*, No. 00-16423, 2002 U.S. App. Lexis 28040, at *23 (9th Cir. June 26, 2002). The court's logic ignores completely the fact that students may refuse to "perform" the Pledge of Allegiance but they do not have the same constitutional right to refuse to sing *"America the Beautiful"* in music class. Worse, however, is the court's implicit assumption that when students recite the Pledge of Allegiance, they mean what they say, but when they sing patriotic music or recite historical documents, they are merely mouthing words without mental affirmation of the contents. *Id*. According to the Ninth Circuit then, constitutional violations hinge on the subjective mental state of the student speakers or singers.

Undoubtedly, teachers who take seriously their responsibility for inculcating the civic values enshrined in the Nation's foundational documents would be dismayed to learn that the Constitution now compels them to ensure that students who recite passages from these documents do not actually believe in the values reflected, lest some objecting student feel mentally coerced. Similarly, the Ninth Circuit's

logic would impel public school music directors to ensure that members of the school chorale do not actually agree with the words of Bach's *"Jesu, Joy of Man's Desiring,"* lest a Hindu soprano be offended.

If allowed to stand, the Ninth Circuit's decision will threaten a sort of Orwellian reformation of public school curricula by censoring American history and excluding much that is valuable in the world of choral music.

II. Certiorari Should Be Granted Because The Ninth Circuit's Decision Is Irreconcilable With What This Court Has Said About The Pledge Of Allegiance.

Although purporting to give "due deference," *Newdow*, 2002 U.S. App. Lexis 28040, at *22, to this Court's numerous statements about the constitutionality of the Pledge of Allegiance, the Ninth Circuit's decision is patently inconsistent with those statements. In every instance in which the Court or individual Justices have addressed patriotic exercises with religious references, including the Pledge of Allegiance, they have concluded unequivocally that those references pose no Establishment Clause problems. No Member of the Court, past or current, has suggested otherwise. To the contrary, recognizing that certain of its precedents may create the impression that patriotic exercises with religious references would be constitutionally suspect, the Court has taken pains to assure that such is not the case.

The Ninth Circuit's analysis was flawed from the start. Claiming reliance on this Court's school prayer cases, including *Lee v. Weisman*, 505 U.S. 577 (1992), the Ninth Circuit lumped together for constitutional analysis religious exercises and patriotic exercises. In every school prayer

case, however, this Court consistently has distinguished between religious exercises, such as prayer and Bible reading, and patriotic exercises with religious references. In *Engel v. Vitale*, 370 U.S. 421 (1962), which struck down New York State's law requiring school officials to open the school day with prayer, the Court explained:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned *religious exercise* that the State of New York has sponsored in this instance.

Id. at 435, n.21.

Just one year later, in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), Justice Goldberg distinguished mandatory Bible reading in public schools from patriotic exercises with religious references:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of

> religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Id. at 308 (Goldberg, J., concurring).

Justice Brennan expressly opined in *Schempp* that "reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." *Id*. at 304 (Brennan, J., concurring).

In *Lee v. Weisman*, 505 U.S. 577 (1992), a decision built in large part on *Engel*, *see* 505 U.S. at 590, 592, the Court reaffirmed the distinction it drew in *Engel* between religious exercises such as state-composed prayers and patriotic exercises with religious references:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The *prayer exercises* in this case are especially improper because the State has in

> every practical sense compelled attendance and participation in an explicit *religious exercise* at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Id. at 597-98 (emphasis added). Quoting with approval the above-cited language from Justice Goldberg's concurrence in *Schempp*, the Court continued:

> Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. *A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.* We recognize that, at graduation time and *throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.*

Id. (citations omitted) (emphasis added).

As in *Engel* and *Schempp*, the deciding factor in *Lee* was that school officials sponsored a religious exercise – prayer. *Lee* gives no support to the Ninth Circuit's conclusion that the voluntary recitation of the Pledge of Allegiance violates the Establishment Clause because it

contains the phrase "One Nation Under God." The Ninth Circuit's ruling that voluntary patriotic exercises are converted into religious exercises if they contain religious references flatly contradicts the Court's assurances to the contrary in *Engel*, *Schempp*, and *Lee*. By ignoring the Court's consistent distinction between religious exercises in public schools, which raise Establishment Clause concerns, and patriotic exercises with religious references, which do not, the Ninth Circuit misapplied *Lee*.

In addition to misreading the Court's school prayer cases, the Ninth Circuit also refused to heed the unequivocal import of Supreme Court statements addressing the Pledge of Allegiance in other contexts. Every time the Court or an individual Justice has mentioned the Pledge of Allegiance, whether in majority, concurring, or dissenting opinions, the conclusion has been that it poses no Establishment Clause problems.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court recognized the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." 465 U.S. at 674. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.* at 675. The Court listed many examples of our "government's acknowledgment of our religious heritage," and included among those examples Congress' addition of the words "under God" in the Pledge of Allegiance in 1954. *Id.* at 676-77.

> [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," 36 U.S.C. § 186, which Congress and the President mandated for our currency, see 31 U.S.C. §

> 5112(d)(1) (1982 ed.), and in the language "one nation under god," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children – and adults – every year.

Id. at 676-77.

In a concurring opinion, Justice O'Connor stated that governmental acknowledgements of religion such as the National Motto "In God We Trust" "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Id*. at 693 (O'Connor, J., concurring).

A year later in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O'Connor stated explicitly that the words "under God" in the Pledge do not violate the Constitution because they "serve as an acknowledgment of religion with 'the legitimate secular purpose of solemnizing public occasions, and expressing confidence in the future.'" 472 U.S. at 78 n.5 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 693) (O'Connor, J., concurring)).

In *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), Justices Blackmun, Marshall, Brennan and Stevens stated:

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. We need not return to the subject of 'ceremonial deism,'. . .

> because there is an obvious distinction between creche displays and references to God in the motto and the pledge.

492 U.S. at 602-603.

The three dissenting Justices in *Allegheny*, Justices Kennedy, Rehnquist and Scalia, agreed that striking down national traditions such as the Pledge would be a disturbing departure from the Court's precedents upholding the constitutionality of government practices recognizing the nation's religious heritage. The dissent pointed out that the Establishment Clause does not

> require a relentless extirpation of all contact between government and religion. . . . Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage. . . . "[W]e must be careful to avoid the hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history."

Id. at 657 (Kennedy, J., concurring) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 670-71 (1970)).

In sum, every Member of the current Court that has expressed any opinion about the constitutionality of the Pledge of Allegiance has stated that it poses no Establishment Clause problems. The Ninth Circuit's insistence, therefore, that the Pledge of Allegiance becomes

unconstitutional when school children recite it is insupportable.

III. This Court Should Grant Review To Resolve The Split In The Circuits Created By The Ninth Circuit's Decision.

In *Sherman v. Community Consolidated School District*, 980 F.2d 437 (7th Cir. 1992), the Seventh Circuit rejected an Establishment Clause challenge to a public school's policy of having school children recite the Pledge of Allegiance. Unlike the Ninth Circuit, the court acknowledged its responsibility to follow the Supreme Court's clear direction: "[i]f the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." 980 F.2d at 448.

Additionally, the Ninth Circuit's decision conflicts in principle with the decisions of two other Courts of Appeal holding that the performance of religious music by public school students is consistent with the Establishment Clause. *See Bauchman v. W. High Sch.*, 132 F.3d 542 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995) (Establishment Clause did not forbid school choir from using a religious piece as its theme song).

CONCLUSION

For the foregoing reasons, Amici respectfully urge this Court to grant Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record

COLBY M. MAY
STUART J. ROTH
JAMES M. HENDERSON
JOEL H. THORNTON
JOHN P. TUSKEY
LAURA B. HERNANDEZ

AMERICAN CENTER FOR
LAW & JUSTICE
205 Third Street SE
Washington, DC 20003
(202) 546-8890

Attorneys for Amici Curiae